

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JEFF MACTAGGERT MASONRY, LLC,
d/b/a JM2

and

Cases 14-CA-138748
14-CA-143817
18-CA-135993

INTERNATIONAL UNION OF BRICKLAYERS
AND ALLIED CRAFTWORKERS LOCAL 15
MO-KS-NE

and

INTERNATIONAL UNION OF BRICKLAYERS
AND ALLIED CRAFTWORKERS LOCAL 3
IOWA

William F. LeMaster and Lauren M. Fletcher, Esqs.
for the General Counsel.

Kelly R. Baier, Esq. (Bradley & Riley, PC), Cedar Rapids, Iowa
for the Respondent.

Bruce C. Jackson, Jr (Arnold, Newbold, Winter & Jackson, P.C.)
Kansas City, Missouri,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Omaha, Nebraska and Council Bluffs, Iowa on March 17-19, 2015. Bricklayers Local 15 filed charges 14-CA-138748 and 143817 on October 15, 2014 and January 5, 2015 respectively. Bricklayers Local 3 filed the charge in 18-CA-135993 on September 4, 2014. The General Counsel issued a consolidated complaint and notice of hearing on January 27, 2015.

This is what is commonly referred to as a salting case.¹ The General Counsel alleges that Respondent has refused to consider several union officials for employment, or hire them for open

¹ Judge Posner in *Hartman Brothers Heating and Air Conditioning, Inc. v. NLRB*, 280 F. 3d 1110 (7th Cir. 2002) noted that many employers suspect that the purpose of salting is not in fact to organize, but to precipitate the commission of unfair labor practices by startled employers.

positions for which they were qualified. The General Counsel further alleges that Respondent did so because of these applicants' association with the Unions and because they indicated their intention to promote unionization of Respondent's employees and to discourage its employees from seeking union representation in violation of Section 8(a)(3) and (1) of the Act.

The General Counsel also alleges that Respondent discharged employee Marvin Monge, a "covert" salt, from his job in Nebraska due to his union activities and discharged or refused to hire Monge in Iowa for the same reasons. The General Counsel further alleges that Respondent violated Section 8(a)(1) in implementing a number of rules and changing its application procedure to discourage employees from engaging in union and or other protected activities. Finally, the General Counsel alleges that Respondent, by foreman George Owen III, violated Section 8(a)(1) by threatening employees with physical violence.

There are a number of cases under the Act that apply to salting cases and thus establish the framework for considering the facts of this case. The most important of these cases are:

NLRB v. Town & Country Electric, Inc., in which the Supreme Court, noting the considerable deference accorded to the Board's interpretation of the Act, affirmed that the Board could lawfully construe the Act's definition of "employee" to include paid union organizers. 516 U.S. 85, 94-95, 98 (1995).

FES, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). In *FES*, Board held that:

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

The FES framework was modified by the Board in *Toering Electric Co.*, 351 NLRB 225, 232-34 (2007). The Board found that in salting cases, the General Counsel bears the ultimate burden of proving the applicant's genuine interest in employment. This burden has two components: 1) that there was an application for employment; and 2) that if the employer contests the applicant's actual interest employment, the General Counsel must prove by a preponderance of the evidence that that the applicant was genuinely seeking to establish an employment relationship with the employer.

Another case which is not directly applicable to the proceeding on the merits before me, but which obviously has great bearing on the litigation posture of this case is *Oil Capitol and Sheet Metal*, 349 NLRB 1348 (2007). In that case the Board held that the General Counsel, as part of his existing burden of proving a reasonable gross backpay amount due, must present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed in the General Counsel's compliance specification.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Jeff MacTaggart Masonry, d/b/a JM2, is a masonry contractor, which does business in Nebraska and Iowa. It performed services valued in excess of \$50,000 in states other than Nebraska where its principal office is located, and purchased and received goods valued in excess of \$50,000 directly from points outside of Nebraska during the 12-month period ending on November 30, 2014. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Unions, Bricklayers Locals 3 and 15 are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Jeff MacTaggart established JM2 in 2012. Prior to that he worked for many years for Seedorff Masonry, a contractor that is a signatory to collective bargaining agreements with at least one Bricklayers local union. JM2 operates out of the same building in Omaha, Nebraska as does Seedorff. Donna Smith, the receptionist at this building, who worked for Seedorff until about 2011, services both Seedorff and JM2.² MacTaggart hired a number of Seedorff employees for JM2, who had been union members.

The Union salting campaign; Respondent hires Marvin Monge, a "covert" salt

In early 2014, the Bricklayers Unions targeted JM2 and possibly other non-union contractors for a salting campaign in the Omaha area. The Union(s) solicited Marvin Monge, a member of Local 15 living in Kansas City to go to Omaha and apply for work. The Union paid his expenses to do so.

Monge went to JM2's Omaha office and filled out an employment application on March 31, 2014. He spoke to Scott Fangman, Respondent's Nebraska superintendent. Monge did not disclose his union affiliation. There was no discussion about how recently Monge had

² Smith has worked for Select Construction Concepts since about 2011. She has worked in the building that houses Seedorff and JM2 for about 14 years.

worked as a bricklayer and no discussion as how Monge came to look for work with Respondent. There was also no discussion of any referral policy for applicants.

5 On April 6, Scott Fangman called Monge and told him to report to a JM2 jobsite in Fremont, Nebraska, the next day. Monge worked at several locations for JM2 from April 7 to August 9, 2014. Fangman, and at least one of Monge's jobsite foremen, Ian Lindberg, testified that Monge performed his job tasks well.

The Union "job actions" at Respondent's office and jobsites

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Sometime in July 2014, before July 14, the Union(s) began appearing adjacent to JM2 jobsites and outside Respondent's Omaha office. The Union engaged in what it terms a "job action." It displayed a large inflatable cat or pig, banners and flyers contending that Respondent jeopardized the wages, benefits and working conditions established by the Union.
15 The Union did not engage in picketing and gave no indication that it was seeking recognition from Respondent.

Union organizers apply for work with Respondent

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On about July 1, 2014, Union Organizer Jared Skaff went to a JM2 jobsite and obtained a JM2 employment application from JM2 foreman Ian Lindberg.

Organizers Jared Skaff and Ray Lemke apply on July 14, 2014

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On July 14, union organizers Jared Skaff, Ray Lemke³ and Francis Jacobberger went to Respondent's Omaha office. Skaff and Lemke approached the counter inside the main entrance. Jacobberger sat in a chair against a wall about 10-15 feet from the counter. Donna Smith, the receptionist, recognized Skaff from his prior employment with Seedorff Masonry.

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Skaff and Lemke were wearing union paraphernalia. They asked for employment applications, filled out the front side of the application, attached a résumé and submitted them. At the bottom of each résumé was a statement indicating that the applicant intended to organize JM2 bricklayers. This statement was highlighted on each résumé.

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Skaff turned on a recording device and Jacobberger recorded the event with his cell phone. This recording demonstrates that Donna Smith was not upset while the union representatives were in Respondent's office and continued to perform her job functions in a normal fashion, G.C. Exh. 24.

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Jeff MacTaggart came briefly to the counter from his office which was located down the hall while Skaff and Lemke filled out their applications. He also briefly acknowledged Skaff's presence. MacTaggart was already aware that Skaff was a union bricklayer. Afterwards, Donna Smith took the applications to Jeff MacTaggart.

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³ Lemke is not alleged to be a discriminatee in this case.

Respondent hires “covert” salt Kirk Zabriskie on July 24

5 On or about July 23, 2014, William “Kirk” Zabriskie, a Local 15 member, who had been recruited by the Union to salt Respondent, stopped by a JM2 jobsite at a hospital in Fremont, Nebraska. Zabriskie first spoke to the jobsite foreman and then to JM2’s Nebraska superintendent, Scott Fangman. Fangman met Zabriskie at the Fremont jobsite on July 24.

10 Zabriskie, who is about 60 years old, told Fangman that he had years of experience as a bricklayer. Fangman did not question Zabriskie’s physical ability to perform bricklayer’s work and did not ask him how recent was his work experience. Zabriskie did not disclose his relationship with the Union. Zabriskie filled out an employment application. Fangman hired him on the spot. Respondent also hired a number of other bricklayers and laborers in July and August 2014.

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July 29, 2014, union organizers Francis Jacobberger and Ernest Adame apply for work with Respondent

20 On July 29, union organizers Francis Jacobberger, Ernest Adame and Jacob Skaff went to Respondent’s Omaha office. All three were wearing union paraphernalia. Nobody was at the receptionist’s counter when they arrived. Jacobberger walked down a hallway and spoke to an individual who summoned Donna Smith.

25 Jacobberger and Adame submitted the front of JM2 employment applications that they had filled out in advance and résumés to Smith. These résumés contained a statement that the applicants intended to organize Respondent’s bricklayers. That statement was also highlighted.

30 Prior to July 29, Respondent routinely accepted applications filled out only on the front. The back of the front of the application did not have any spaces to be completed by the applicant. Other parts of the application package, such as the W-4 form were routinely completed by employees after they were hired. Donna Smith did not tell the applicants that their applications were insufficient or incomplete.⁴

35 Skaff, who entered the office somewhat after Jacobberger and Adame, sat in a chair and may have made a recording with his cell phone. He did not approach the counter.

40 Smith told Jacobberger and Adame that she would pass their applications on and they left. The video taken by Jacobberger with a pen-like recording device does not indicate that Smith was in any way intimidated or upset by this event. The interaction between Jacobberger and Smith lasted no more than about 30 seconds. Adame spoke hardly, if at all. It is not apparent that Smith was even aware of Skaff’s presence. Respondent hired bricklayers and laborers after July 29, 2014.

⁴ Smith may have told Jacobberger and Adame that Respondent was only taking applicants’ names and telephone numbers. However she received the applications and gave them to Jeff MacTaggart.

Jacobberger followed up on his application by calling Superintendent Scott Fangman on his cellphone in August. I credit Jacobberger's testimony that Fangman told him he would check on the status of the application. I also credit Jacobberger's testimony that he made subsequent calls to Fangman, which were not answered and that his voice messages were not returned.⁵ In October 2014, Jacobberger went to Respondent's office to inquire on the status of his application. Donna Smith told him that he needed a referral from a current employee. When Jacobberger asked Jeff MacTaggart about the referral policy, MacTaggart told him it was none of his business and asked him to leave.

Respondent changes its application policy; posts signs at its office

Almost immediately after the visit by Jacobberger and Adame, Respondent posted two signs on the glass of the door to the building occupied by JM2 and Seedorff. One said that JM2 is not accepting applications at this time. The other said "No soliciting, No loitering, No cameras." These policy changes were made in response to the visits to Respondent's offices by the union organizers.

A few days later, on about August 4, Respondent replaced these with two new signs. One stated that JM2 was currently taking applications only through its referral program. The other said solicitation, loitering, photography or recording on the premises without prior approval of the tenants was prohibited. These were new policies. Prior to July 29, Respondent had accepted employment applications from walk-ins, and had advertised for help on Craigslist.⁶

The covert salts, Monge and Zabriskie, divulge their union affiliation

While working at the JM2 jobsite at Lauritzen Gardens in July, Marvin Monge joined a union "job action" at lunch and divulged his support for the Unions.

On July 30, the Union engaged in a "job action" at the Fremont, Nebraska hospital with the inflatable animal, banners, etc.. At lunch Kirk Zabriske went out to where the organizers were standing to demonstrate his support for the Union.

The termination(s) of covert salt Marvin Monge

Monge is hired and fired in Nebraska

During his 4 months of employment with Respondent in Nebraska, Marvin Monge worked at several different projects laying brick. As stated previously, he divulged his union affiliation while working at Lauritzen Gardens in late July.

⁵ Fangman at Tr. 300, admitted he had a telephone conversation with Jacobberger in August and did not contradict Jacobberger on any material matter. While he testified that Jacobberger only identified himself by his first name, Fangman's testimony, in so far as it suggests that at no point did he not know that the caller was Jacobberger, is internally inconsistent and incredible.

⁶ In May 2014, Respondent had initiated a program which compensated its employees with a "finder's fee" for referring job applicants who were hired. However, it continued to accept applications from walk-ins until after the union organizers applied for work at its office.

5 In the first week of August 2014, Monge asked his forman at the Lauritzen Gardens project for a week off to go camping with his children. The foreman, Ian Lindberg, had no objection but asked Monge to talk to Superintendent Scott Fangman. Fangman also approved the time off. At the time Respondent was encountering delays in performing its work at Lauritzen Gardens due to the scheduling difficulties with other trades.

10 While he was away, Monge had Union Organizer Francis Jacobberger send a certified letter to Fangman stating that he would have to go to Washington, D.C. to care for his mother who had taken ill. The letter stated that Monge would return in two weeks, rather than one.

15 Monge did not go to the Washington, D.C. area,⁷ but returned unannounced to the Lauritzen Garden jobsite on Tuesday, August 19, one day after he originally said he would be back. Fangman told Monge that he did not have any work for him on August 19, but that Monge should call him back later that day. Fangman did not ask Monge why he was back early.

20 After speaking to Fangman, Monge called the union hall. He was instructed to go to a union "job action" at a JM2 project at 9th and Jones Streets in Omaha. While at the job action, Monge made eye contact with George Owen, the foreman on the job, for whom he had worked previously. He noticed Owen making a call on his cellphone. Later, Monge and an organizer approached Owen and other employees at lunch and offered them cold drinks.

25 At 4:00 p.m. on August 19, Monge spoke again with Fangman. Fangman told Monge that he had never seen a letter like the one he received on Monge's behalf and that he considered it a resignation letter.⁸

⁷ Monge's mother does not live in Washington, D.C. but rather with several children in suburban Virginia and Maryland.

⁸ Respondent did not contradict Monge's testimony on any material issue. Therefore I credit Monge. Monge's testimony of his conversation with Fangman on the morning of August 19 is corroborated by a recording Monge made of the conversation. Fangman decided to fire Monge after learning of his presence at the job action at 9th and Jones. Respondent's brief at page 35 concedes that Fangman did not consider that Monge had submitted a resignation letter until his second conversation with Monge on the afternoon of August 19. The brief does not even mention Monge's protected activity, participation in the job action at 9th and Jones, which occurred between the two conversations.

After Monge testified about the events surrounding his terminations, Respondent recalled Otdoerfer and also called Owen to the stand on March 19. It did not recall Fangman. Owen did not contradict Monge's testimony that Owen saw him at the job action on August 19 and immediately made a call on his cellphone. In fact Owen did not mention Monge at all.

Otdoerfer contradicted Monge on a tangential issue, but did not contradict Monge's testimony that he told Monge he had no work for him on August 25 or 26 after telling him quite the contrary on August 22. Otdoerfer admits that he had talked to Fangman about Monge in the interim.

I do not credit Otdoerfer's testimony at Tr.118 and 119. Otdoerfer testified that he talked to Monge about completing his application after August 25 or 26. By this time, Fangman had already fired Monge. According Otdoerfer's testimony at Tr. 114-15, he'd already talked to Fangman on August 22, about Monge's supposed lying about the reasons for his leave and prior employment in Nebraska. I also don't credit any of Respondent's testimony suggesting that any supposed inconsistencies regarding Monge's reasons for taking leave had anything to do with his discharge. He was fired as a result of

Marvin Monge is hired and fired in Iowa

On August 21, 2014, Marvin Monge called Isaac Otdoerfer, JM2's Iowa Superintendent, and asked if JM2 was hiring. Otdoerfer met with Monge on August 22. They discussed Monge's work experience but Monge did not tell him that he had worked for Respondent in Nebraska. Monge told Otdoerfer that his last employer was Bonilla, which is a company owned by a relative of Monge. Otdoerfer hired Monge to work as a bricklayer on a project at a school in Indianola, Iowa the next week.

Sometime after Otdoerfer hired Monge, possibly on August 22, Tr. 114, Otdoerfer spoke with Scott Fangman. I infer that Fangman told Otdoerfer that he had fired Monge the previous week. He may also have discussed the reasons for Monge's discharge and/or the pretext regarding Monge's inconsistent reasons for going on leave. Monge reported to the Indianola jobsite on Monday, August 25 or Tuesday, August 26. The foreman at the site told Monge that he did not have any work for him. Monge then spoke with Otdoerfer. Otdoerfer also told Monge he had no work for him. They never spoke after that. Essentially, Respondent fired Monge from the Iowa project before he ever performed any work for it. The reason for his discharge is related in whole or in part to his participation in the job action at 9th and Jones on August 19.

George Owen's alleged threat

In late August or early September, Kirk Zabriskie, who had already identified himself as a union supporter, was transferred to Respondent's jobsite at 9th and Jones Streets in Omaha. Respondent's foreman at this site was George Owen.

Zabriskie testified that as soon as he walked on the jobsite, Owen stated that Zabriskie was a "union guy" and that that he was going kick the ass of the union demonstrators in the parking lot because they were stealing gas from Respondent and doing stuff to Respondent's trucks, Tr. 452. At Tr. 473, Owen denied saying anything to Zabriskie about being in the Union, threatening Zabriskie or making any statement about whipping Zabriskie's ass. Owen did not contradict Zabriskie's testimony that Owen said he was going to kick the ass of the participants in the union job action. I find that he did so.

Analysis

With regard to most of the issues in this case very little legal analysis is required. The General Counsel clearly met its burden under *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), *enfd.* 301 F.3d 83 (3d Cir. 2002). Indeed, Respondent at page 26 of its post-trial brief concedes this point. Respondent was hiring bricklayers and laborers, Jacobberger, Adame and Skaff had experience relevant to the bricklayer and laborer positions for which

being spotted at the union job action on August 19. Moreover, anything Monge said pertaining to this case that was not true was also immaterial, see *Hartman Brothers Heating and Air Conditioning, Inc. v. NLRB*, *supra*.

JM2 was hiring.⁹ Furthermore, there is no question that anti-union animus was the principal reason they were not hired. To the extent that Respondent suggests that it did not hire these individuals due to any deficiency in their applications, I conclude this contention is pretextual. Had there been anything deficient in their applications, Donna Smith would have told them so.

There is also no question either that Respondent fired Marvin Monge from his job in Nebraska because of his union activities and fired him (or refused to put him to work) in Iowa for the same reasons. The timing of Scott Fangman's change of heart with regard to Monge, after learning that he participated in a union job action on August 19, clearly establishes the nexus between Monge's discharge and his union activities. I also infer this was the reason Respondent in effect rescinded its offer of employment to Monge in Iowa.

George Owen's remarks to Kirk Zabriskie about kicking the ass of the union representatives demonstrating at the 9th and Jones worksite were also coercive regardless of the fact that he did not threaten violence against Zabriskie. The remark was made on Zabriskie's first day on the 9th and Jones worksite. Owen was aware that Zabriskie was a union supporter and according to this record had no basis for assuming that the union officials were responsible for any of the vandalism he believed occurred at the worksite.

In other contexts the Board has held that statements about "kicking your ass" even when directed to the listener do not, if standing alone, convey a threat of physical harm, *Laesco, Inc.*, 289 NLRB 549 fn. 1 (1988). In *Laesco*, the Board found that such a comment was a "colloquialism" not so egregious that an employee otherwise engaged in protected activity sacrificed the protections of the statute. In *Lamar Advertising of Janesville*, 340 NLRB 979, 980-81 (2003) the Board overruled employer objections based on statements by two pro-union employees that they would "kick the ass" of another employee. In *Town & Country Supermarkets*, 340 NLRB 1410, 1412-13 (2004), on the other hand, the Board found an employer was entitled to discharge an employee. It found the "kick ass" comment in that case was more than mere bravado, but was a physical challenge.

Since the General Counsel litigated the Owen comment as a threat of physical violence, I dismiss this complaint allegation. Owen clearly did not threaten Zabriskie with physical violence and Zabriskie could not have seriously thought that Owen was going to assault the union participants in the job action.

The Toering Issue

Respondent contests the actual interest in employment of union organizers Jacobberger, Skaff and Adame. Pursuant to *Toering Electric Co.*, 351 NLRB 225, 232-34 (2007), the General Counsel must prove that each of these men was genuinely seeking an employment relationship with JM2. It is not entirely clear from Board cases what the General

⁹ At page 29 of its brief, Respondent states that Jacobberger's application showed no prior experience as a laborer or bricklayer. However, the résumé attached to that application indicated 16 years of such experience. Moreover, Respondent hired applicants who were far less specific about their experience. Contrary to Respondent's brief, Adame listed a masonry contractor as one of his two most recent employers.

Counsel needs to do to meet this burden. One could say that it is sufficient if the applicant shows up in person to apply for work and at the trial, establishes that he or she is qualified to do the job and testifies that he or she would have worked for the Respondent had a job been offered.¹⁰ If this is the requisite test, Respondent violated the Act with regard to all three
5 applicants in this matter, see, e.g. *Cossentino Contracting Co.*, 351 NLRB 495 (2007). The Board in *Cossentino* held that a lack of recent on-the-job experience did not necessarily indicate a lack of genuine interest in employment.

I find that the General Counsel clearly met its burden with regard to Jacobberger and
10 Skaff. Adame presents a closer question. The General Counsel established that Jacobberger has in fact worked for a non-union contractor recently for a substantial period while employed by the Bricklayer's Union as an organizer.¹¹ The fact that he lives in Maryland is irrelevant to whether he was genuinely seeking work. Construction workers often live apart from their families while working. Apart from my awareness of this fact from numerous cases in which I
15 have presided, Marvin Monge and Kirk Zabriskie established that in this record. I also infer that the Union would have subsidized Jacobberger's living expenses, as it did for Monge and Zabriskie. Moreover, Jacobberger testified, without contradiction, that if he was hired long-term by Respondent he would live with an aunt in Omaha.

Jared Skaff lives in the Omaha, Nebraska area and has worked as a bricklayer from
20 1998 through March 2014 and again after February 2015. I thus credit his testimony that he would have accepted a job with JM2 and I infer the Union would have made up the difference between union scale and JM2's compensation, as it did with Monge and Zabriskie. I do not credit Jeff MacTaggart's self-serving testimony as to why he would not hire Skaff, which is
25 unsupported by any documentation regarding Skaff's work history.

Ernest Adame is a union regional representative based in California. The evidence that supports the proposition that Adame was genuinely seeking employment is that he applied for work with Respondent, was qualified for the positions for which he applied and testified at the
30 trial that he would have accepted a job if offered.

Unlike Jacobberger, there is no evidence that Adame had ever worked as a bricklayer for any substantial period of time while also being employed by the Union. When asked if he had ever worked as a bricklayer while also being a regional representative, Adame could not
35 give many specifics. He also stated that such employment "wasn't a long period. It was just to gather some information," Tr. 343. Since 2006 he appears to have worked as a bricklayer only once, for a non-union contractor named Frazier, for less than a week.¹² Nevertheless, Adame's lack of recent long-term full time employment as a bricklayer, does not, pursuant to *Cossentino* indicate that he was not genuinely seeking employment. Thus, I find that the

¹⁰ This is not to say that an employee whose application is submitted by another employee or even an organizer, might not also have a genuine interest in being hired as a salt.

¹¹ Respondent made no attempt to discredit Jacobberger's testimony at Tr. 236 about his 2012 salting work as a mason and laborer for Academy Stone in Annapolis, Maryland. Respondent subpoenaed Jacobberger's W-2 forms, so it could easily have attacked the credibility of this testimony if it could have done so.

¹² Adame's age, 56, is irrelevant to whether he would have accepted a job with Respondent. JM2 hired Zabriskie, who may be older.

General Counsel met its *Toering* burden with regard to Adame, as well as with Jacobberger and Skaff.

5 Adame lives in California and has been a regional representative since 2006. I infer that the Union paid his expenses while organizing in Nebraska and would have continued to have done so if Adame had been hired by Respondent. I draw this inference from the fact that the Union subsidized the employment and living expenses of Monge and Zabriskie.

The Section 8(b)(7)(C) issue

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Section 8(b)(7)(C), of the Act provides that:

...it shall be an unfair labor practice for a labor organization or its agents:

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(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees:

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(C) where such picketing has been conducted without a petition under section 9(c) [section 159(c) of this title] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) [section 159(c)(1) of this title] or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b) [this subsection].

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The Union sent Respondent a letter on May 13, 2014 disclaiming any intention of trying to organize Respondent's employees. The letter stated that the Union's only objective in the course of its dispute with Respondent was to inform the public that JM2's employees received substandard wages. This letter appears somewhat inconsistent with the Union's salting campaign. Nevertheless, I conclude that section 8(b)(7)(C) of the Act does not have any relevance to this case. First of all, Respondent never filed an unfair labor practice charge alleging that the Union was in violation of this provision. Moreover, at no point did

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Respondent contend that its refusal to hire Skaff, Adame and Jacobberger and/or to discharge Monge was due to an alleged violation of Section 8(b)(7)(C) by the Union.

5 *Respondent violated Section 8(a)(3) and (1)in changing its application policies in response to the salting campaign. It violated Section 8(a)(1) in posting no loitering, no soliciting and no photography signs.*

10 The General Counsel alleges in paragraphs 6 and & 7 of the complaint that Respondent violated Section 8(a)(3) and (1) in changing its application policies in response to the salting campaign. He also alleges that Respondent violated Section 8(a)(1) in posting no loitering, no soliciting and no photography signs on the doors to its building.

15 It is absolutely clear from this record that in changing its application process, first to refuse to take applications from walk-ins, and then to exclude applicants other than referrals, Respondent was motivated by a desire to screen out union members, particularly the union organizers. The timing of these changes to the application process could not make Respondent's motives clearer. Thus, JM2 violated the Act as alleged, *M.J. Mechanical Services*, 325 NLRB 1098, 1108 (1998). The timing of its posting of the signs prohibiting solicitation, photography, etc. also leads me to conclude that Respondent was motivated by a desire to make it more difficult for union organizers to apply for a job and for the applicants to disprove any claims by Respondent that the Union applicants had acted in a threatening or other inappropriate manner.¹³

20 Respondent's claims that it changed its application process to protect Donna Smith have no merit. Even after it refused to let non-referrals apply, anyone could walk into the building and approach Donna Smith at the counter. Respondent also applied the referral policy in a discriminatory manner. This is demonstrated by the fact that Respondent hired Marvin Monge on August 22, without a referral and without Otdoerfer's knowledge of his union affiliation.

25 The employment applications in the record suggest that other non-union applicants were also hired without a referral by a current employee. While some of the applications of employees hired indicated a referral, others do not. For those whose applications that do not indicate who referred the applicant to Respondent, there is no other evidence regarding a referral.

30 The employment applications in the record suggest that other non-union applicants were also hired without a referral by a current employee. While some of the applications of employees hired indicated a referral, others do not. For those whose applications that do not indicate who referred the applicant to Respondent, there is no other evidence regarding a referral.

35 I also find that Respondent failed to establish that any of these changes were motivated by nondiscriminatory insurance concerns, as alleged at pages 15-16 of its post-trial brief. There is nothing to support a relationship between Respondent's changes to its application process and insurance concerns other than its bald assertion. For example, while the brief states that Respondent was concerned with lower skilled employees not working safely, there

¹³ While the union organizers did not explain why they needed to record the application process, Respondent's claims that Donna Smith was upset or felt threatened by them, establishes there was some legitimate reason for doing so. The recordings establish that Ms. Smith was not visibly upset, or threatened in any way. Thus, for example, I discredit Jeff MacTaggart's testimony that Smith was "rattled, Tr. 36." If she even noticed the person filming the July 29 episode, she would have recognized Jacob Skaff as the photographer.

is no credible evidence, for example, that Sam Bryant, hired by Respondent as a laborer on July 30, 2014 had any skills relevant to masonry work, or that he was referred to Respondent by a current employee. Moreover, Jeff MacTaggart admitted that the changes were motivated at least in part by the visits of the union salts to its office, Tr. 79.¹⁴

5 In summary, the changes to Respondent's application process and the rules posted on the door of its building were promulgated in response to union activity and therefore violated the Act, *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

10 *Conclusions of Law*

Respondent violated Section 8(a)(3) and (1) by refusing to consider Francis Jacobberger, Jared Skaff and Ernest Adame for employment and refusing to hire them in July 2014.

15 Respondent violated Section 8(a)(3) and (1) in discharging Marvin Monge on August 19, 2014 and refusing to rehire him and/or discharging him on August 25, 2014.

Respondent violated Section 8(a)(3) and (1) in first changing its application process in refusing to accept applications from walk-ins and then limiting the process to referrals.

20 Respondent violated Section 8(a)(1) in posting signs on the doors to its building prohibiting loitering, solicitation and cameras.

25 *REMEDY*

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

30 The Respondent having discriminatorily refused to hire Francis Jacobberger, Jared Skaff and Ernest Adame, it must make them whole for any loss of earnings and other benefits, consistent with the Board's decision in *Oil Capitol and Sheet Metal*, 349 NLRB 1348 (2007), computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center*, 356 NLRB No. 8 (October 22, 2010) as computed in *New Horizons*, 283 NLRB 1173 (1987).

35 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

¹⁴ In an affidavit given to the General Counsel on November 18, 2014, MacTaggart did not mention insurance costs as a reason for the exclusivity of the referral program. I conclude this to be a post-hoc rationalization and discredit it.

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Jeff MacTaggart Masonry, d/b/a JM2, Omaha Nebraska and Ankeny, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Refusing to consider for employment or refusing to hire any job applicant because the applicant is a union organizer, supports a union or seeks union representation.
- (b) Discharging or otherwise discriminating against any employee for engaging in union or other protected concerted activities.
- (c) Changing its application policies to discourage union applicants.
- (d) Adopting rules, including the posting of signs, designed to prohibit union applicants from documenting their applications for employment.
- (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Within 14 days of the Board's Order, offer immediate employment (instatement) to Francis Jacobberger, Jared Skaff and Ernest Adame in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.
- (b) Within 14 days from the date of the Board's Order, offer Marvin Monge full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (c) Make Francis Jacobberger, Jared Skaff, Ernest Adame and Marvin Monge whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the Board's decision.
- (e) Within 14 days of the Board's Order, remove from Respondent's files any reference to the unlawful refusal to hire Francis Jacobberger, Jared Skaff, and Ernest Adame and within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them.
- (f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges/refusal to hire of Marvin Monge, and within 3 days thereafter notify him in writing that this has been done and that the discharge/refusal to hire will not be used against him in any way.

- (g) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.
- 5 (h) Compensate Francis Jacobberger, Jared Skaff, Ernest Adame and Marvin Monge for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.
- 10 (i) Rescind all changes to its application procedures that decline to accept applications from walk-ins and limit its application process to referrals.
- (j) Remove all signs and rescind all rules initiated to discourage applicants from applying in person at Respondent's offices and to prohibit applicants from documenting the circumstances of the submission of their applications.
- 15 (k) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze
- 20 the amount of backpay due under the terms of this Order.
- (l) Within 14 days after service by the Region, post at its Omaha, Nebraska facility copies of the attached notice marked "Appendix A."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the
- 25 Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the
- 30 Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 14, 2014.
- 35 (m) Within 14 days after service by the Region, post at its Ankeny, Iowa facility copies of the attached notice marked "Appendix B."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 19, 2014.

(n) In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(o) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 6, 2015.

Arthur J. Amchan
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to consider for hire or refuse to hire any job applicant because we believe that they intend to try to organize our employees or because they seek union representation by any labor organization including the International Union of Bricklayers and Allied Craftworkers Local 15, MO-KS-Ne and Local 3, Iowa..

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Union of Bricklayers and Allied Craftworkers Local 15, MO-KS-Ne and Local 3, Iowa or any other union.

WE WILL NOT refuse to accept employment applications from walk-ins.

WE WILL NOT limit our application process to referrals.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Marvin Monge full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of the Board's Order, offer immediate employment to Francis Jacobberger, Jared Skaff and Ernest Adame in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

WE WILL make Marvin Monge whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL make Francis Jacobberger, Jared Skaff, Ernest Adame and Marvin Monge whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the Board's decision.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful refusal to hire Francis Jacobberger, Jared Skaff, Ernest Adame and Marvin Monge and WE WILL, within 3 days thereafter, notify Francis Jacobberger, Jared Skaff, Ernest Adame and Marvin Monge in writing that this has been done and that the refusal to hire them will not be used against them.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Marvin Monge and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Francis Jacobberger, Jared Skaff, Ernest Adame and Marvin Monge for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL rescind the changes in our employment application process that refused to accept applications from walk-ins to our office and the policies that refused to accept applications or consider for employment any applicant other than a referral.

WE WILL remove all signs and rescind all policies that were initiated to discourage applicants from documenting the circumstances of the submission of their application, including removal our signs stating that no solicitation, no loitering and no cameras are allowed.

JEFF MACTAGGERT MASONRY, LLC,

d/b/a JM2

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website:

www.nlr.gov.

1222 Spruce Street, Room 8.302, Saint Louis, MO 63103-2829
(314) 539-7770, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/14-CA-138748 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7780.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

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d/b/a JM2

(Employer)

Dated _____ By _____
(Representative) (Title)

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www.nlr.gov.

Towle Building, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221
(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.



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